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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS; MR. & MRS. HUGH A. GROVES; FRANCIS SEELY; ESTELLE WHITTLE; HENRY WHITTLE; MR. & MRS. BURTON W. ATKINSON; MR. & MRS. C. E. DIETRICH; HARRIET MILLER: and ALICE VAN LANDINGHAM,

Petitioners,

v.

NATHAN MALCHMAN, GERTA CONWAY, WILLIAM DEAUTRIELL, LOUIS STONE,

and

LEONARD DAVIS, SOPHIE DAVIS, COLONIAL PENN GROUP, INC., COLONIAL PENN FRANKLIN INSURANCE COMPANY, INTRAMERICA LIFE INSURANCE COMPANY, NATIONAL ASSOCIATION PLANS, INC., AMERICAN ASSOCIATION OF RETIRED PERSONS, NATIONAL RETIRED TEACHERS ASSOCIATION, CARRIE B. ALLEN, ORANDA BANGSBERG, BERNARD BERGGREN, JUNE BIGGAR, ARTHUR BOUTON, OLAF KAASA, CLARA L. KLEWENO, FLOYD E. TUMBLESON J. LEONARD JOHNSON, C.E. CARMICHAEL, AMERICAN ASSOCIATION OF RETIRED PERSONS INSURANCE TRUST, DOROTHY M. CRIPPEN, JAMES J. BROWNING, LLOYD I. SINGER, CYRIL F. BRICKFIELD and JOHN J. MacWILLIAMS,

Respondents.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE LOWER COURTS DO NOT HAVE THE DISCRETION TO BIND 11.5 MILLION CLASS MEMBERS WITH A TAINTED SETTLEMENT 2

II. THE LOWER COURTS' FAILURES TO MAKE PROPER FINDINGS AND THEIR ERRORS OF LAW ARE REVIEWABLE BY THIS COURT 3

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Cohen v. Young,
127 F.2d 721 (6th Cir. 1942), *cert. denied*,
321 U.S. 778 (1944) 8

Copitka v. Colonial Penn Group, Inc.,
No. 44274, Cal. Super. Ct., San Diego Cty. (1979) 6

Flinn v. FMC Corp.,
528 F.2d 1169 (4th Cir. 1975), *cert. denied*,
424 U.S. 967 (1976) 7

Girsh v. Jepson,
521 F.2d 153 (3d Cir. 1975) 7

Greenfield v. Villager Industries, Inc.
483 F.2d 824 (3d Cir. 1973) 8

In re Beef Industry Antitrust Litigation,
607 F.2d 167 (5th Cir. 1979), *cert. denied*,
452 U.S. 905 (1981) 8

Page

In re General Motors Corp. Engine Interchange Litigation,
594 F.2d 1106, 1131 (7th Cir.1979), *cert. denied,*
444 U.S. 870 (1979) 7

Jeff D. v. Evans,
743 F.2d 648 (9th Cir. 1984), *cert. granted,*
____ U.S. ____, 105 S.Ct. 2319 (1985) (No. 84-1288) 7

Mendoza v. United States,
623 F.2d 1338 (9th Cir. 1980), *cert. denied,*
450 U.S. 912 (1981) 7

Obin v. District 9, Int'l Ass'n of Machinists,
651 F.2d 574 (8th Cir. 1981) 7

Pettway v. American Cast Iron Pipe Co.,
576 F.2d 1157 (5th Cir. 1978), *cert. denied,*
439 U.S. 1115 (1979) 7

Phillips Petroleum Co. v. Shutts,
____ U.S. ____, 105 S. Ct. 2965 (1985) 6

Plummer v. Chemical Bank,
668 F.2d 654 (2d Cir. 1982) 2

Prandini v. National Tea Co.,
5578 F.2d 1015 (3d Cir. 1977) 7

Shroder v. Suburban Coastal Corp.,
729 F.2d 1371 (11th Cir. 1984) 7

Susman v. Lincoln Am. Corp.,
561 F.2d 86 (7th Cir. 1977) 7

Turoff v. May Co.,
531 F.2d 1357 (6th Cir. 1976) 7

Other Authorities:

Manual for Complex Litigation
§1.46 (rev. ed. 1981) 8

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Respondents.

PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners file this Reply Memorandum addressing the principal arguments presented by the Oppositions to the

petition for writ of certiorari filed herein by Respondents.[1] As shown herein, Respondents' efforts to avoid review by this Court of the largest class action ever certified are fundamentally flawed and wholly at odds with the decisions of this Court and the courts of appeals which require – as a matter of due process – that the interests of absentee class members be protected *at all times* by class representatives and class counsel and federal judges who are, respectively, fiduciaries and "guardians" of the class.

I. THE LOWER COURTS DO NOT HAVE THE DISCRETION TO BIND 11.5 MILLION CLASS MEMBERS WITH A TAINTED SETTLEMENT.

Respondents argue that the decision below is insulated from review on certiorari because approval of a class action settlement is a matter entrusted to the discretion of the lower courts. This discretion, however, must be exercised consistent with the duty of the courts to serve as a guardian of the interests of absentee class members. The Second Circuit itself has held that a district court is "*bound* to withhold" approval of any settlement until it is satisfied that the settlement was not "influenced in any way by fraud or collusion" and that the named plaintiffs "were adequate representatives of the *entire* class" having "no interests which were antagonistic to those other class members." *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2nd Cir. 1982) (Emphasis supplied).

This settlement, which extinguishes damage claims *valued by the district court at between $100 to $225 for*

[1]Two separate Oppositions have been filed, one by class counsel, referred to hereafter as Plaintiffs-Respondents and one brief by the CPG Defendants and Association Defendants, referred to hereafter as Defendants-Respondents.

each of the 2.5 million insurance buying class members (App. 57a-58a) in return for a $2,000,000 payment to class counsel, fairly reeks of collusion. Additionally, the district court here never conducted any inquiry at all into the adequacy of representation afforded the "entire" class by class counsel's brother, mother-in-law, the sister of another counsel's chauffeur, and the close friend and dining companion of yet another. Indeed, the district court's analysis of this question proceeded from the wholly-erroneous legal premise that the named-plaintiffs could serve as class representatives so long as they did not have "an interest in the attorney's fee." (App. 64a-65a). Finally, despite admissions by counsel recorded in written transcripts that they had negotiated fees throughout negotiations involving the merits and admittedly long before even exchanging written settlement proposals, the district court barred any further inquiry into the conduct of settlement negotiations.

A decision approving a settlement under these circumstances is entitled to no deference at all, much less deference which would foreclose review by this Court.

II. THE LOWER COURTS' FAILURES TO MAKE PROPER FINDINGS AND THEIR ERRORS OF LAW ARE REVIEWABLE BY THIS COURT.

Respondents assert that the majority decision of the Second Circuit does not warrant review because it is based upon findings of fact which are not clearly erroneous. They contend that the lower courts' determinations regarding the adequacy of these plaintiffs to serve as class representatives, the asserted worthlessness of the damage claims extinguished and the conduct of settlement negotiations involve factual issues not proper for review on a writ of certiorari. Respondents are clearly wrong as to each matter.

First, as already noted, the district court never made any findings regarding the adequacy of counsel's brother, mother-in-law, chauffeur's sister and personal friend to serve as representatives of this truly enormous class. The court of appeals found it necessary to examine materials not even in the district court record in order to address the adequacy-of-representation issue. Truncated review by a divided appellate court of incomplete state court depositions which were not even part of the record[2] is simply not

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[2]As described in the Petition, Circuit Judge Oakes reviewed the incomplete state court depositions of several of the named plaintiffs, which depositions the district court had refused to accept or review. Judge Oakes ignored the fact that there had been a protracted discovery dispute involving defendants efforts to determine whether all the plaintiffs had been solicited by class counsel. In September, 1979, counsel for CPG and Association Defendants had filed a motion to compel in state court in which they asserted:

> "We seek to develop a factual record sufficient to permit this Court, . . . to find whether plaintiffs' lawyers solicited their clients and maintained this suit. . . .
>
> * * *
>
> [T]he facts already on the record furnish strong reason to believe that there may well have been improper solicitation of the *four* plaintiffs." (Memorandum in Support of Defendants' Motion to Compel Disclosure by Plaintiffs, pp. 6, 11 (Sept. 28, 1979)). (Emphasis supplied).

As part of their agreement to settle this discovery dispute, Defendants agreed not to pursue these inquiries any further except as to Gerta Conway, who recanted her earlier admission that she had been solicited to become a plaintiff. The lead plaintiff in this action, the brother of class counsel, was never deposed.

Because of their previous vigorous attack on the adequacy of these plaintiffs to serve as class representatives, the Defendants-Respondents understandably treat this issue gingerly in their Opposition, asserting only that the court of appeals' findings do not warrant review. Plaintiffs-Respondents never acknowledge the incompleteness of the record or the impropriety of the court of appeals' consideration of materials outside the record on appeal; they are forced to argue that

the type of process under which findings are made which must be thereafter accepted unless "clearly erroneous."

Second, the district court never found that the damage claims were worthless as Respondents contend. To the contrary, the district court engaged in a rough estimate of "the possible range of antitrust damage claims" as follows

> "[I]f we assume that a person who was paying $9.00 per monthy would have been able to purchase from another company at 10% less – we have damages of $.90 per month. Trebled, that gives an amount of $2.70 per month. This gives antitrust damages at the rate of $32.40 per year. If we realize that the 10% is probably generous, and that the $9.00 represents the higher end of the premiums, it becomes apparent that the antitrust damages, if they could be proved at all, would be something considerably less than $32.40 per year." (App. 57a-58a).

When this figure is multiplied by the seven-year period for which damages could have been recovered and by 2.5 million class members, it yields $567,000,000 in class-wide damages. The district court, however, concluded that

> "[t]his is obviously a situation where the value of damage claims would be so small as to be virtually meaningless to the purported 'beneficiaries.' " (App. 58a).

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one or two good apples in a barrel of rotten ones is all that is necessary to satisfy the adequacy requirements of Rule 23 and the Due Process Clause. They cite no case to support their contention that a class can be bound by a settlement where three out of four of the named-representatives have interests antagonistic to the class which prevent them from being adequate representatives.

This conclusion, which the court of appeals' majority affirmed, is wrong as a matter of law as it is totally inconsistent with this Court's observation in *Phillips Petroleum Co. v. Shutts*, ____ U.S. ____, 105 S.Ct. 2965, 2974 (1985) that claims of "about $100 per plaintiff" are the very type of claims which the class action mechanism was intended to redress.[3]

While persisting in characterizing the damage claims extinguished here as "worthless", both Oppositions fail to mention *Copitka v. Colonial Penn Group, Inc.*, No. 44274, Cal.Super.Ct., San Diego City. (1979). The CPG Respondents settled that case, brought by two class members, which had raised, in the words of CPG counsel, virtually the same issues as involved in this litigation for $500,000 only a few months after this settlement was consummated.

Third, the district court never made any findings regarding the manner in which fees were negotiated other than accepting as "credible" the conclusory affidavits of counsel. The district court ignored altogether the transcribed statements of counsel that fees had been discussed throughout negotiations and the incontrovertible fact that fee issues were agreed upon before written drafts of the settlement agreement – which were themselves the subject of further negotiations – were ever exchanged. *Even Respondents tacitly concede that they had reached a "free*

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[3]Class counsels' assertion that they are "experienced" attorneys who carefully researched the viability of damage claims at the outset of this litigation finds no corroboration in their lengthy time sheets which are in the record. Rather, time sheets of counsel show that hundreds of hours of damages research occurred only *after settlement negotiations were underway,* and that they had drafted a damage complaint (which was never filed) solely to obtain additional leverage to recover higher fees. (See Petition & notes 14, 15).

sailing" agreement on fees long before settlement drafts were exchanged. Finally, no discovery at all was permitted to elucidate the reasons for the discrepancies between counsel's on-the-record statements to the state court referee and the settlement documents on the one hand with their vague affidavit recitations on the other.

III. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Respondents argue that the Second Circuit's majority decision is not in conflict with the decisions of other circuits (a) condemning simultaneous negotiation of counsel's fees and merits issues affecting the class: *Jeff D. v. Evans,* 743 F.2d 648, 651-52 (9th Cir. 1984), *cert. granted,* ____ U.S. ____, 105 S.Ct. 2319 (1985) (No. 84-1288); *Mendoza v. United States,* 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981);*Prandini v. National Tea Co.,* 557 F.2d 1015, 1020-21 (3d Cir. 1977); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1216 n. 71 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); *Obin v. Dist. 9, Int'l Ass'n of Machinists,* 651 F.2d 574, 582 (8th Cir. 1981); (b) disqualifying representatives who have familial and close personal relationships with class counsel: *Susman v. Lincoln Am. Corp.* 561 F.2d 86 (7th Cir. 1977); *Turoff v. May Co.,* 531 F.2d 1357 (6th Cir. 1976); *Shroder v. Suburban Coastal Corp.,* 729 F.2d 1371 (11th Cir. 1984); (c) holding that objectors are entitled to conduct discovery and to participate in an evidentiary hearing regarding the fairness of the settlement: *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1131 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979); *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975),

cert. denied, 424 U.S. 967 (1976); *Greenfield v. Villager Industries, Inc.,* 483 F.2d 824, 833 (3d Cir. 1973); *Cohen v. Young, 127 F.2d 721, 724 (6th Cir. 1942), cert. denied,* 321 U.S. 778 (1944); and (d) suggesting that tentative class certification for settlement purposes be sparingly, if ever, used. *In re Beef Industry Antitrust Litigation,* 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied,* 452 U.S. 905 (1981). See also *Manual for Complex Litigation* §1.46 (rev. ed. 1981).

Defendants-Respondents admit that *Prandini, supra,* requires disapproval of all settlements where fee negotiations occur simultaneously with settlement of the merits issues. (Defendants-Respondents' Opposition, p. 12). They argue, however, that *Prandini* has been *sub silentio* overruled by another panel decision of the Third Circuit. *(Id.).* As to the other cases cited immediately above, Respondents maintain that they do not involve *per se* rules as to treatment of specific abuses of the class action mechanism. Though we agree that the other circuit decisions cited above do not foreclose approval of settlements where other factors militate in favor of settlement, the multiple abuses involved here, in the aggregate, place the decision below directly in conflict with *Prandini* and the other decisions listed above. Moreover, apart from these clear circuit conflicts, review is also warranted here because this cases represents an unprecedented perversion of the class action device.

Neither Opposition seriously addresses or disputes Petitioners' contention that the simultaneous negotiation of fees — whether insisted upon by counsel for the plaintiff class or for the defendant — poses a far more serious threat to the due process rights of absentee class members than do those cases where defendants insist upon a waiver

of fees as a settlement condition, which is the issue involved in *Jeff D. v. Evans* (No. 84-1288). The threat to absentee class members' rights is even greater where a settlement such as this, in the words of the court of appeals, "adds very little to the benefits" (App. 20a) to which the class was already entitled.

CONCLUSION

For all the foregoing reasons and the reasons set forth previously in their Petition, Petitioners respectfully submit that certiorari be granted to review the decision of the Second Circuit.

Respectfully submitted,

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